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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

FOOD AND ALLIED SERVICES TRADE COUNCIL OF METROPOLITAN WASHINGTON,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether passage of the Workers' Compensation Act of 1979 by the District of Columbia Council contravened the general provisions of the Self-Government and Governmental Relations Act passed by Congress pursuant to Article I, § 8, clause 17 of the Constitution.

2. Whether passage of the Workers' Compensation Act of 1979 was accomplished without Congressional authority and absent express language in the Self-Government Act.

3. Whether passage of the Workers' Compensation Act of 1979 violated the specific prohibitions regarding the enactment of any act or repeal of any act which would result in an interference with a federal function, as set forth in § 1-233(a)(3) of the Self-Government Act.

4. Whether passage of the Workers' Compensation Act of 1979 impermissibly limited the jurisdiction of the federal courts, in violation of § 1-233(a)(8) of the Self-Government Act, while at the same time expanding the jurisdiction of the District's local court system, which is expressly prohibited by § 1-233(a)(4).

PARTIES BELOW

In the Court below, the Petitioner was an Intervenor. The Respondent District of Columbia was the Appellant. In that case, The Greater Washington Central Labor Council of Metropolitan Washington was an Appellee. In a separate action consolidated with the above cases, The Greater Washington Board of Trade was the Appellant, while the District of Columbia was the Appellee.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF CITATIONS	v
OPINIONS AND JUDGMENT BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. The District Of Columbia Court Of Appeals Erred In Determining That Congress, In Passing The District Of Columbia Self-Government Act, Intended To Allow The Council To Enact Legislation Concerning Workers' Compensation For The Private Sector	4
II. The District Of Columbia Court Of Appeals Erred In Concluding That The Self-Government Act Authorized The Passage Of Legislation Transferring The Private Sector Workers' Compensation Program From The Federal Government To The District Government Absent Specific Language Permitting Such A Transfer	9
III. The District Of Columbia Court Of Appeals Erred In Ruling That The Passage Of The Workers' Compensation Act Of 1979 Did Not Violate § 1-233(a)(3) Of The Self-Government Act	15
IV. The District Of Columbia Court Of Appeals Erred In Ruling That The Workers' Compensation Act Of 1979 Did Not Violate The Prohibitions Contained In §§ 1-233 (4) And (8) Of The Self-Government Act	25
CONCLUSION	28
APPENDIX A — Court of Appeals Decision Denying Petition for Rehearing *En Banc*	1a
APPENDIX B — Court of Appeals Decision	3a
APPENDIX C — Trial Court Decision	22a
APPENDIX D — Memorandum of James E. Lemert	35a

Table of Contents Continued

Page

APPENDIX E — Memorandum of Carin Ann Clauss ... 40a
APPENDIX F — Memorandum of Judith Rogers 43a
APPENDIX G — Statutes Involved 51a

TABLE OF CITATIONS

CASES:	Page
Amalgamated Association of Street, etc. Employees v. *Adler*, 119 U.S. App. D.C. 274, 340 F.2d 799 (1964)	21
Associated Indemnity v. *Shea*, 455 F.2d 913 (5th Cir. 1972)	23
Baker v. *Carr*, 369 U.S. 186 (1962)	8
Bishop v. *District of Columbia*, 411 A.2d 997 (D.C. App. 1980)	9
California Pub. Util. Comm'n. v. *United States*, 355 U.S. 534 (1956)	24
Capitol Hill Restoration Society, Inc. v. *Moore*, 410 A.2d 184 (D.C. App. 1979)	9
Cardillo v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947)	20, 23
Citizens Association of Georgetown v. *Zoning Commissioner of the District of Columbia*, 392 A.2d 1027 (D.C. App. 1978)	7
Crowell v. *Benson*, 285 U.S. 22 (1934)	17, 22, 23
Dillingham v. *Massey*, 505 F.2d 1126 (9th Cir. 1974)	22
Director, Office of Workers' Compensation Programs v. *Boughman*, 178 U.S. App. D.C. 132, 545 F.2d 210 (1976)	21
Director, Office of Workers' Compensation Programs v. *National Van Lines*, 198 U.S. App. D.C. 239, 613 F.2d 972 (1979)	17, 20, 22, 26
District of Columbia v. *Thompson*, 346 U.S. 100 (1953)	5
District of Columbia v. *Washington Home Ownership Council, Inc.*, 415 A.2d 1349 (D.C. App. 1980)	7, 8, 9
Don't Tear It Down v. *Pennsylvania Ave. Dev. Corp.*, 206 U.S. App. D.C. 122, 642 F.2d 527 (1980)	24
Gudmundson v. *Cardillo*, 75 U.S. App. D.C. 230, 126 F.2d 521 (1942)	3, 16, 22, 24
Hancock v. *Train*, 426 U.S. 167 (1976)	24
Harrington v. *Moss*, 407 A.2d 658 (D.C. App. 1979)	18

Table of Citations Continued

Page

Hastings v. *Earth Sattelite Corporation*, 202 U.S. App. D.C. 85, 628 F.2d 85 (1980), *cert. denied*, 449 U.S. 905 (1980) 21

Haughton Elevator Co. v. *Lewis*, 572 F.2d 447 (4th Cir. 1978) 22

Hepburn v. *Elzey*, 2 Cranch 445 (1805) 6

In Re District of Columbia Workmen's Compensation Act, 180 U.S. App. D.C. 216, 554 F.2d 1075 (1976), *cert. denied*, 429 U.S. 820 (1976) 17, 23, 26

In Re Neagle, 135 U.S. 1 (1890) 24

Johnson v. *Maryland*, 254 U.S. 51 (1920) 24

Mayo v. *United States*, 319 U.S. 441 (1943) 24

Metropolitan Casualty Insurance Co. v. *Hoage*, 72 F.2d 175 (D.C. Cir. 1934) 23

Milhouse v. *Levi*, 179 U.S. App. D.C. 1, 548 F.2d 357 (1976) 14

Palmore v. *United States*, 411 U.S. 389 (1973) 6

Philbrook v. *Glodgett*, 421 U.S. 707 (1975) 7

Potomac Electric Power Co. v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980) . 19, 21

Rockport Yacht Supply Co., Inc. v. *Hollis*, 371 F. Supp. 1229 (S.D. Tex. 1973) 23

Southern Pacific Co. v. *Jensen*, 244 U.S. 205 (1917) .. 17

Sperry v. *Florida*, 373 U.S. 379 (1963) 24

Thomas v. *Washington Gas Light Co.*, 448 U.S. 261 (1980) 19, 20

Travelers Insurance Co. v. *Cardillo*, 78 U.S. App. D.C. 392, 141 F.2d 362 (1944) 23

United States v. *Nixon*, 418 U.S. 683 (1974) 8

U.S. Industries/Federal Sheet Metal, Inc. v. *Director, Office of Workers' Compensation Programs*, U.S. (Decided March 23, 1982) 19

Table of Citations Continued

Page

STATUTES:

United States Constitution

U.S. CONST., art. I, § 8, cl. 17 ..... 3, 4, 11

U.S. CONST., art. VI, cl. 2 ..... 24, 25

United States Code

5 U.S.C. § 8101 ..... 10, 11

5 U.S.C. § 8139 10

28 U.S.C. § 1257(3) 1

33 U.S.C. § 908(c)(1-20) 21

33 U.S.C. § 918(a) 18

33 U.S.C. § 919(d) 23

33 U.S.C. § 921(b) 18

33 U.S.C. § 921(c) 26

33 U.S.C. § 939(a) 18

33 U.S.C. § 939(h) 18

Acts of Congress

District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 (D.C. Code 1981, §§ 11-101 *et seq.*) 3, 25

District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. 93-198, 87 Stat. 774, (D.C. Code 1981, §§ 1-201 *et seq.*) ..... *passim*

§ 204(e) 10

An Act to Provide for Voluntary Apprenticeship in the District of Columbia, 60 Stat. 204, May 20, 1946 (36 D.C. Code § 121 *et seq.*) (Supp. V, 1978) 11

Organic Act of June 11, 1878, 20 Stat. 102 5

Defense Base Act, Act of August 16, 1941, ch. 357, 55 Stat. 622 (42 U.S.C. §§ 1651 *et seq.*) 17

Non-Appropriated Fund Instrumentalities Act, Act of June 19, 1952, ch. 444, 66 Stat. 138 (5 U.S.C. §§ 8171 *et seq.*) 17

Table of Citations Continued

Page

Workmen's Compensation Law of the District of Columbia, Act of May 17, 1928, 45 Stat. 600 (D.C. Code 1973, §§ 36-501 *et seq.*) 17

District of Columbia Code

§ 1-201 (1981) 3

§ 1-233(a) (1981) 3, 16

§ 1-233(a)(3) (1981) 16, 20, 24, 25

§ 1-233(a)(4) (1981) 3, 24, 27, 28

§ 1-233(a)(8) (1981) 3, 24, 27, 28

§ 1-233(b) (1981) 3, 16

§ 36-121 (1973) 11

§ 36-501 (Supp. V, 1978) ..... *passim*

§ 36-503 (Supp. V, 1978) 19

§ 36-322(b)(3) (1981) 26

§ 36-322(c) (1981) 26

Acts of Council

District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139 (1979) (D.C. Code 1981, §§ 1-601.1 *et seq.*) 7

District of Columbia Workers' Compensation Act of 1979, D.C. Law 3-77 (1980) (D.C. Code 1981, §§ 36-301 *et seq.*) ..... *passim*

MISCELLANEOUS:

73 *Am. Jur.*2d *Statutes* § 211 (1974) 14

Black's Law Dictionary, 906 (4th Revised Ed. 1968) .. 14

Longshoremen's and Harbor Workers' Act Procedure Manual (LHWCA-PM, United States Department of Labor, December, 1978) 18

H. Rept. No. 93-482, 93d Cong., 2nd Sess. (1974) 5

Legislative History of the District of Columbia Self-Government and Governmental Reorganization Act, 93d Cong., 2nd Sess., H. Doc. 93-320 (1974) 5

Petitioner, Food and Allied Services Trades Council of Metropolitan Washington prays that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals.

OPINIONS AND JUDGMENT BELOW

The Opinion and Order of the District of Columbia Court of Appeals denying the petition for rehearing *en banc*, not yet officially reported, dated April 28, 1982, is set forth in Appendix A. The opinion of the Court of Appeals is reported at 442 A.2d 110, and is set forth in Appendix B. The opinion and decision of Associate Judge John F. Doyle of the Superior Court of the District of Columbia was delivered orally on September 26, 1980 also is unreported and is set forth in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1982. The Order of the Court of Appeals denying the Petitions for Rehearing and/or Rehearing En Banc was entered on April 28, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

The statutes and constitutional provisions central to the instant petition are set forth in Appendix G. They are indexed as follows:

United States Constitution

Article I, § 8, clause 17

Article VI, clause 2

United States Code

33 U.S.C. § 918(a)

33 U.S.C. § 921(c)

33 U.S.C. § 921(d)

District Of Columbia Code

§ 1-201(a) (1981)

§ 1-204 (1981)

§ 1-233(a)(3) (1981)

§ 1-233(a)(4) (1981)

§ 1-233(a)(8) (1981)

§ 36-322(b)(3) (1981)

§ 36-322(c) (1981)

§ 36-501 (Supp. V, 1978)

STATEMENT OF THE CASE

On May 6, 1980, the District of Columbia Council passed the Workers' Compensation Act of 1979. The Act was designed to permit the District of Columbia to administer the workers' compensation program for private sector employment in place of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* as made applicable to the District, D.C. Code 1978, § 36-501 *et seq.* The latter Act had provided for federal control over the workers' compensation program since its enactment in 1928. The effect of the new law was to repeal § 36-501 and its federal control over the program. After the required congressional review period, the Act of 1979 became law on July 1, 1980.

In addition to the establishment of a locally managed program, the Act also permits appeals from administrative decisions to be taken to the District of Columbia Court of Appeals, D.C. Code 1981, § 36-322(b)(3), while enforcement matters are handled by the Superior Court. § 36-322(c).

On July 15, 1980, the Greater Washington Central Labor Council, AFL-CIO, representing a number of private sector unions, filed suit against the District of Columbia for a declaratory judgment as to the validity of the Act as well as injunctive relief. After cross motions for summary judgment,

the trial court ruled that the Act was null and void in that it violated the prohibitions contained in the District of Columbia Self-Government and Governmental Reorganization Act of 1973, D.C. Code 1981, § 1-201 *et seq.* On a general level, the trial judge determined that Congress' failure to repeal the existing federal coverage and its further failure to expressly transfer the private sector program to the District, as was done for the public employees' program in a scrupulously detailed manner, precluded the District from legislating on the subject of private sector workers' compensation. More specifically, the court ruled that the Act of 1979 and the repeal of § 36-501 had interfered with the federal functions performed by the United States Department of Labor in direct contravention of §§ 1-233(a(3) and (b) of the Self-Government Act. The court further found that the assumption of jurisdiction over compensation claims by the local courts represented an impermissible alteration of the jurisdiction of both the federal and local courts under the terms of § 1-233(a)(4) and (a)(8) of the Self-Government Act.

On appeal to the District of Columbia Court of Appeals, the decision of the trial court was reversed. The appellate court found that nothing in the Self-Government Act prevented the Council from legislating on the issue of private sector workers' compensation, a subject considered "local" in nature under the Self-Government Act. The Court then went on to find that no federal functions were disturbed inasmuch as all functions performed by the Department of Labor were local functions restricted to the District. For support, the Court looked to the case of *Gudmundson* v. *Cardillo*, 75 F.2d U.S. App. D.C. 230, 126 F.2d 521 (1942), which referred to § 36-501 as a local law passed by Congress under its Article I oversight responsibility. Similarly, the Court ruled that the assumption of jurisdiction by the local courts was permissible as they already had the authority to enforce awards and review contested administrative cases under the District of Columbia Court Reform and Criminal Procedure Act, D.C. Code 1981, §§ 11-101 *et seq.* In sum, the Act of 1979 was found valid and operational.

Petitioner filed a request for review *en banc*, which was denied. In a brief statement, however, four of the judges indicated that they would have preferred that the whole court pass on the issue of the transfer of jurisdiction rather than a three member panel.

In light of the trial court's decision as well as the opinion expressed in the *en banc* denial, the present petition ensued.

REASONS FOR GRANTING THE WRIT

I

The District Of Columbia Court Of Appeals Erred In Determining That Congress, In Passing The District Of Columbia Self-Government Act, Intended To Allow The Council To Enact Legislation Concerning Workers' Compensation For The Private Sector

In its decision, the District of Columbia Court of Appeals briefly reviewed the Self-Government Act, D.C. Code 1981, § 1-201 *et seq.* and concluded that nothing in its language precluded the Council of the District of Columbia from enacting the Workers' Compensation Act of 1979 on behalf of workers in the private sector. The Court's analysis of the Self-Government Act, however, was flawed at best, failing as it did to address a number of arguments advanced by petitioner herein. Petitioner respectfully asserts that a careful examination of the Self-Government Act in the context in which it arose will mandate a decision that the Council's action was unsanctioned and contrary to the desire of Congress.

At the outset, no quarrel exists as to Congress' right to legislate on behalf of the District of Columbia pursuant to Article I, Section 8, Clause 17 of the United States Constitution. U.S. CONST., Art. I, § 8, Cl. 17. That document provides Congress with

> . . . the power . . . to exercise exclusive legislation in all cases whatsoever over such District . . .

Congress, in decades past, has exercised this authority by passage of a number of Organic Acts designed generally to

grant a modicum of self-government to the inhabitants of the District. While it has always been a possibility that Congress could delegate full legislative power to the District, [1] such a transfer is subject to Congress' concomitant power "at any time to reverse, alter or revoke the authority granted." *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 109 (1953). It was within this context that the drive for home rule culminated in the drafting of what ultimately became the Self-Government and Governmental Reorganization Act of 1973, Pub. L. 93-198, 87 Stat. 774.

As the Court of Appeals noted in its opinion, the Self-Government Act was passed to "relieve Congress of the burden of legislating upon essentially local District matters." 442 A.2d at 113, citing D.C. Code 1981, § 1-201. The Court, however, failed to place this section in the conjunctive context of the ultimate oversight function of Congress. Despite the relatively broad language quoted above, the legislative history, set forth in several volumes, is replete with Congressional concern regarding the possibility of an over-extensive grant of powers to the District which would violate the restrictions set forth in Article I. Indeed, House District Committee Chairman Brock Adams' concern with the matter of Congressional authority was such that he solicited a memorandum of law on the issue from Professor Jason I. Newman of Georgetown University. Professor Newman agreed that home rule legislation was a valid exercise of Congressional power, but noted that Congress must and *did intend to retain ultimate* legislative authority over the District. [2] After reviewing the *Thompson* case, *supra*, Professor Newman stated as follows:

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[1] *See*, for example, the Organic Act of June 11, 1878, 20 Stat. 102, which mandated a three Commissioner form of government.

[2] H. Rept. No. 93-482, 93d. Cong. reprinted in "Legislative History of the District of Columbia Self-Government and Governmental Reorganization Act," H. Doc. 93-320, 1973 at 1055-1060 (Committee Print 1974) (Hereinafter referred to as "Home Rule History").

> Regarding the . . . issue of whether Congress can exercise authority over that which it has delegated to the District of Columbia, it is clear that Congress may enact legislation which involves authority that has also been placed in the hands of the local government.
>
> * * *
>
> . . . it is quite clear that Congress may take away any legislative or fiscal powers granted to the District of Columbia government at any time. [3]

Similarly, Senator Charles McC. Mathias, in discussing S.1435, the Senate version of the Self-Government Act, stated that Congress had an "historic constitutional responsibility" [4] to oversee the governance of the District despite the passage of the Act. Additionally, in its report made part of S.1435, the Senate stated that

> . . . [t]he Congress may take such action as, in its wisdom, it deems desirable with respect to any municipal action taken by the people or government of the municipality under the authority of the charter. Congress would continue to initiate local legislation should it so desire. Thus, Congress under the terms of this bill, *retains* full residual, ultimate and exclusive legislative jurisdiction over the District in conformity with the Constitutional mandate . . . [5]

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[3] Home Rule History, at 1069.

[4] *Id.* at 343.

[5] Home Rule History at 280. It is also worth noting that the Senate drafters used the terms "municipal" and "municipality," making it clear that Congress did not intend to equate the District with any of the states, home rule legislation notwithstanding. Certainly the Supreme Court has long recognized that the District is "constitutionally different from the states." *Palmore* v. *United States*, 411 U.S. 389 (1973), citing *Hepburn* v. *Elzey*, 2 Cranch 445 (1805). See also the letter of the Chief Judge Gerard D. Reilly of the District of Columbia Court of Appeals to Representative Ancher Nelson, dated August, 1973, in which he stated that, in his view, the Home Rule Act does not confer statehood on the District. Home Rule History at 1126.

This small sampling of the statements from the record manifests the extreme care which Congress took in drafting the Self-Government Act. Viewing this effort in light of the cardinal rule of statutory construction that courts must implement the will of Congress, *Philbrook* v. *Glodgett*, 421 U.S. 707 (1975); *District of Columbia* v. *Washington Home Ownership Council, Inc.*, 415 A.2d 1349 (D.C. App. 1980), as well as the corollary that the statutory language must be looked at "within the context of the whole legislative scheme when legislative intent is to be determined," *Citizens Association of Georgetown* v. *Zoning Commission of the District of Columbia*, 392 A.2d 1027, 1033 (D.C. App. 1978), it is clear that Congress' grant to the District was not, and could not, be as all inclusive as the District's Court of Appeals suggests. The Self-Government Act, to be sure, does grant a fair measure of legislative authority to the District; it does so, however, within the boundaries of Congress' desire and obligation to maintain control over matters which may be local in nature and certainly over those activities which involve "federal functions." Thus, it appears that Congress intended that the District involve itself in legislating in areas of purely local interest, as evidenced by the passage of the Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139, D.C. Code 1981, §§ 1-601.1 *et seq.* and a number of revenue raising measures. To summarize, then, Petitioner suggests that the brief review of the Self-Government Act by the Court below fails to support the Court's ultimate conclusion that the Self-Government Act confers broad enough authority for the District to legislate in areas which are not local in nature and which may infringe on federal activities in the city.

The Court of Appeals' review of the Self-Government Act is notably brief. By simply reciting the standard phrases justifying the existence of the Self-Government Act, [6] the Court attempted to confer validity on the action taken by the Council.

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[6] See the opinion printed in Appendix B at PP. 3a-21a.

This obvious effort to defer to the Council's interpretation of its own authority is inconsistent with the Court of Appeals' earlier view of this issue expressed in *District of Columbia* v. *Washington Home Ownership Council, Inc., supra.* There, the Court was faced with a review of emergency legislation passed by the Council. Before doing so, the Court cautioned that the Council is the result rather than the initiator of the Self-Government Act. Thus, the Council's interpretation of its own authority must yield to Congressional intent.[7] The concurring opinion of Judge Gallagher went a step further in stating that it is inappropriate to construe the Congressional enactment, the Self-Government Act, to save the local legislature's action:

> . . . Deference to the legislative body is not appropriate, however, when the issue is interpretation of the "constitution" [i.e., the Self-Government Act].[8]

The essence of this approach is to commit to the courts the decision as to whether the enabling document grants authority to another branch of government or whether that branch exceeded its prescribed authority. *See, United States* v. *Nixon*, 418 U.S. 683 (1974) and *Baker* v. *Carr*, 369 U.S. 186 (1962).

In the instant action, however, the panel simply catalogues the specific prohibitions contained in the Self-Government Act after the brief recitation of Congress' general reasons for passage of the Act. The Court's limited analysis does not explain the Council's action in the area of private sector workers' compensation. The importance of the subject to the District, as evidenced by the two year effort required for passage, demanded a careful and precise inquiry into the reasons for and limitations of the Self-Government Act as well as a review of the Council's action. Instead, the Court allowed the Council's enactment to attain a quality of presumptive validity before its analysis began. The result was a foregone conclusion, despite

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[7] 415 A.2d at 1351, n. 5.

[8] *Id.* at 1367.

the specific prohibitions set forth by Congress. This result was erroneous and thereby taints the conclusions reached in the remainder of the opinion.

Petitioner respectfully avers that had the Court reviewed the Self-Government Act as comprehensively as it did in the *Home Ownership Council* case, and in other cases since 1973, [9] it would have reached the inescapable conclusion that the authority granted by Congress to the District failed to encompass passage of the Workers' Compensation Act of 1979. The reluctance of the Court to rule accordingly must be construed as error.

II

The District Of Columbia Court Of Appeals Erred In Concluding That The Self-Government Act Authorized The Passage Of Legislation Transferring The Private Sector Workers' Compensation Program From The Federal Government To The District Government Absent Specific Language Permitting Such A Transfer

Throughout the course of this action, Petitioner has urged examination of the Self-Government Act to determine whether Congress intended that the District acquire the private sector workers' compensation program. The thrust of this Petitioner's argument has been that the Self-Government Act specifically authorizes the transfer to the District of a number of governmental functions, including several affecting workers. The Act is peculiarly silent on the matter of private sector workers' compensation despite its coverage of several hundred thousand employees and the involvement of millions of dollars.

The trial court viewed this omission in a succinct fashion in its opinion delivered from the bench:

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[9] *See, Bishop* v. *District of Columbia*, 411 A.2d 997 (D.C. App. 1980) and *Capitol Hill Restoration Society, Inc.* v. *Moore*, 410 A.2d 184 (D.C. App. 1979).

> Now, these provisions that [Congress] made for the transfer of these . . . functions of the Secretary of Labor would . . . in a *prima facie* fashion evince a legislative pattern and purpose to transfer to the District of Columbia existing and operating Federal—and operating functions conducted under Federal statutes by Federal officials, only through the means of specific and express statutory provision taking care to preserve carefully the transfer of records and accounts . . .
>
> To suggest that the Congress intended to treat the workers' compensation program covering the private sector in a different fashion would by atypical and against the grain of the legislative pattern manifest in the Act . . . [10]

The Court of Appeals, however, rejected this logical interpretation in favor of the analysis referred to in Argument I. Once again, the Court deferred to the local legislature by attempting to construe the Workers' Compensation Act to rescue the Council's effort from the prohibitions of the Self-Government Act. The Court simply stated, without basis, that nothing in the Self-Government Act prevented legislation on the subject of private sector workers' compensation. The panel also concluded that Congress chose not to transfer the program at that time, apparently leaving it to the District to determine a course of action. That Congress had transferred other programs received little attention from the Court.

In its opinion, the Court of Appeals glossed over the fact that "certain public employment services" [11] were transferred expressly by the Self-Government Act from the Department of Labor to the District government. While it did note the transfer of the public employees' compensation program, [12] the Court attributed that action to the language contained in 5 U.S.C. §§ 8101 and 8139. The rationale was that the public

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[10] Appendix C at 30a.

[11] Appendix B at 10a.

[12] *See* § 204(e) of the Self-Government Act.

program had not been entrusted to the Department of Labor by a statute that was "not applicable exclusively to the District of Columbia." [13] Regardless of the accuracy of this interpretation, it ignores that Congress also made an express transfer of another program which indisputably is effective only within the confines of the District. Section 204(d) of the Self-Government Act expressly transfers the functions of "An Act to provide for voluntary apprenticeship in the District of Columbia." 60 Stat. 204, approved May 20, 1946, from the Secretary of Labor to the District government. That particular Act is not part of the United States Code and was codified solely in D.C. Code § 36-121 *et seq.* (Supp. V, 1978). Thus, assuming the thrust of the Court's assertion with reference to 5 U.S.C. § 8101 *et seq.*, in this instance there is no support remaining for the Court's ruling that Congress did not have to transfer the private sector workers' compensation program in an express fashion, because D.C. Code § 36-501 *et seq.* was a "purely local" rather than federal statute. If Congress felt compelled, as it obviously did, to amend § 36-121 *et seq.* in specific ways to effect a transfer, it is equally clear that identical action was necessary before the District would be allowed to legislate and/or repeal § 36-501 *et seq.* Petitioner therefore submits that the omission of any reference to the express transfer of the apprenticeship program was a further attempt by the Court to validate the Workers' Compensation Act of 1979 despite the Self-Government Act's general and specific prohibitions.

Similarly, the Court saw Congress' failure to address private sector workers' compensation as mere oversight, but this is equally ill-considered. It is respectfully submitted that Congress' restraint was deliberate as that body's intent to preserve its authority over the administration of that program under Article I, Section 8, Clause 17 of the Constitution. The Council encroached upon Congress' constitutional oversight obligation and exceeded the provisions of the Congressionally enacted Self-Government Act.

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[13] Appendix B at 10a.

The tenuous nature of the Court of Appeals' analysis is further borne out by its failure to address the points raised in a number of documents made part of the trial court record. Examination of the memoranda prepared by the Corporation Counsel's office for the Council prior to the passage of the Workers' Compensation Act reveals that the District first espoused and then curiously abandoned the reasoning that later supported the trial court's decision.

In the earliest memorandum, dated February 8, 1980, [14] James E. Lemert, of the Legal Counsel Division, after reviewing the legislative history stated:

> . . . that Congress, at the time of the Self-Government Act, did not intend to transfer the functions of the Secretary of Labor in administering the provisions of the Longshoremen's Act [15] insofar as they pertain to the District of Columbia . . . [16]

Ultimately, Mr. Lemert reached his conclusion:

> In view of the foregoing, it is my opinion that, in the absence of a Congressionally or other federally approved transfer, the council should not repeal the provisions of D.C. Code §§ 36-501 *et seq.*, and provide for the bill to become law pursuant to § 602 of the Self-Government Act. . . . [17]

The conclusion reached therein essentially coincided with that of the Solicitor of the United States Department of Labor, Carin Ann Clauss, who stated in her memorandum of February 22, 1980 [18] that:

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[14] Appendix D at 35a-39a.

[15] This reference to the Longshoremen's Act is noteworthy in light of the "local v. federal" function argument *infra*.

[16] Appendix D at 38a.

[17] *Id.*, at 39a.

[18] Appendix E at 40a-42a.

> . . . Although workers' compensation may be a suitable subject for local law, any proposal to enact such legislation for the District of Columbia could not become effective until Congress repeals the present workers' compensation act which was enacted by Congress in 1928. [19]

A subsequent memorandum of Corporation Counsel, Judith Rogers, dated April 21, 1980, [20] written immediately prior to passage of the law, is essentially a political document. Nevertheless, its final conclusion is that:

> Because of such uncertainty, it would be preferable to obtain Congressional enabling or authorizing legislation to foreclose future challenges to a council act . . . [21]

While none of these documents is dispositive of the issue of express transfer, they do indicate that the matter was considerably less than the foregone conclusion seen by the panel of the Court of Appeals. The Court obviously preferred to disregard the interpretations of the Self-Government Act offered by these governmental representatives who were intimately familiar with both the program and the home rule history. Of all the Department of Labor programs reviewed by Congress, the one most deserving of specific transfer was the private sector compensation program. No other program involved a like number of individuals or required the vast expenditure of funds required for the program to function.

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[19] *Id.* at 41a.

[20] Appendix F at 43a-50a.

[21] *Id.* at 49a. All of this material must be read in conjunction with a letter from Secretary of Labor Peter Brennan to Representative Ancher Nelson urging that the apprenticeship program and the District employees' compensation program not be transferred to the District government. By contrast, Secretary Brennan suggested the transfer of the Longshoremen's Act functions to the District. Congress, however, did precisely the opposite, lending further credence to the fact that Congress never intended to transfer the private program or to permit the District to repeal § 36-501 *et seq.*

Petitioner respectfully suggests that the preceding arguments can best be summarized under the concept of *inclusio unius exclusio alterius*. Essentially, this doctrine imports that a designation of one item, party or matter operates as an absolute exclusion of all others. [22] In the context of the Self-Government Act, this doctrine means that the specific transfers made therein of United States Department of Labor functions operate as an exclusion of any Labor Department functions involving private sector workers' compensation.

The courts in the District of Columbia have recognized this doctrine as it applies to the growth of home rule and have given it much credence. Specifically, in *Milhouse* v. *Levi*, 179 U.S. App. D.C. 1, 548 F.2d 357 (1976), the United States Court of Appeals spoke to the issue as it applied to the Self-Government Act and its effect on the Lorton Reformatory furlough program:

> Congress, in enacting both the Court Reform Act and the Home Rule Act, did not amend any of the provisions under which the Attorney General has regulated the furlough program at the Lorton Reformatory. *In light of the long-standing practice in this regard, any assumption that failure to amend was due to inadvertence as distinguished from design would be to ignore the meticulous care Congress exhibited in conforming other statutory provisions to its legislative scheme for the District of Columbia* [footnote omitted]. *In short, if Congress had intended to alter the nature of the Attorney General's control over the Lorton Reformatory furlough program, same could have been done by express provision.* [23] (Emphasis supplied)

The reasoning set forth above undoubtedly applies to the issue herein. Had Congress desired to arrange for local control over workers' compensation for 300,000 private sector employees, it would have done so when it specifically disposed of programs

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[22] See generally, *Black's Law Dictionary*, 906 (4th Revised Ed. 1968) and 73 Am. Jur.2d Statutes § 211 (1974).

[23] 548 F.2d at 363.

of far lesser scope, not simply leaving it to Council to act upon at some indeterminate "later time" [24] as the panel below stated. If Congress intended only to defer transfer of the private program to a future date, little effort would have been required to so delay. Inasmuch as Congress did not do so, one can only conclude, pursuant to the *inclusio* doctrine, that no transfer was intended or even contemplated.

In summary, then, the Court of Appeals arrived at its decision that no express transfer of the private sector program was required under the Self-Government Act by skirting the obvious intent of Congress, an intent recognized by the participants in the local legislative process. Instead, the Court substituted conclusionary statements designed to justify the Council's action. The net result is that the decision failed, perhaps by design, to discern that the Workers' Compensation Act of 1979 violated the general precepts of the Congressionally passed Self-Government Act. Petitioner therefore respectfully opines that the error of the Court of Appeals presents a substantial federal issue as to whether the local legislature can override the intent of Congress and the constitutional mandate. Petitioner asserts that review of this aspect of the decision below is warranted.

III

The District Of Columbia Court Of Appeals Erred In Ruling That The Passage Of The Workers' Compensation Act Of 1979 Did Not Violate § 1-233(a)(3) Of The Self-Government Act

In addition to the general prohibitions inherent in the Self-Government Act, Congress provided a significant number of explicit interdictions to ensure that the District government would not infringe upon Congress' ultimate authority over the Federal city. The limitations contained in D.C. Code 1981,

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[24] Appendix B at 10a.

§§ 1-233(a) and (b) were focused upon by the parties and the Court below. One of the primary prohibitions is enumerated in § 1-233(a)(3). That subsection states as follows:

> (a) The council shall have no authority to pass any act contrary to the provision of this Act except as specifically provided in this Act or to—
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> * * *
>
> (3) [e]nact any act, or enact any act to amend or repeal any act of Congress, which concerns the functions or property of the United States or which is not restricted, in its application exclusively in or to the District.

The trial court reviewed the prohibitory language and ruled that the passage of the Worker's Compensation Act clearly violated § 1-233(a)(3) in that it interfered with a function of the United States, *i.e.*, the administration of the Longshoremen's Act extension to the District by the United States Department of Labor as well as the enforcement powers of the federal courts. The Court of Appeals, however, reversed this ruling by limiting the definition of "federal function" to activities involving the "integrity of the federal domain." [25] Additionally, the panel found the case of *Gudmundson* v. *Cardillo*, 75 U.S. App. D.C. 230, 126 F.2d 521 (1942) authoritative on the issue of whether private sector compensation was exclusively a local matter. Petitioner respectfully asserts that the panel's decision cannot withstand close scrutiny.

In its decision, the Court of Appeals "surmised" [26] that Congress simply wanted to prevent District officials from interfering with federal officials in the performance of their national duties. The Court determined that performance of an allegedly local function by federal officials did not convert that function to one "federal" in nature. Thus, the fact that the Longshore-

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[25] Appendix B at 12a.

[26] Appendix B at 11a.

men's Act, as extended to the District, was administered and enforced by the federal government, did not make such activity a "federal function." Once again, the panel engaged in conclusion making without benefit of any in depth review of the obvious and extensive federal characteristics inherent in the program provided for in D.C. Code § 36-501 *et seq.*

No doubt exists about the genesis of § 36-501. By virtue of the Act of May 17, 1928, Ch. 612, § 1-3, 45 Stat. 600 (1928), Congress extended the provisions of the Longshoremen's Act to the private employees of the District. The Act incorporated both the substantive and procedural provisions of the Longshoremen's Act. *Director, Office of Workers' Compensation Programs* v. *National Van Lines, Inc.*, 198 U.S. App. D.C. 239, 613 F.2d 972 (1979), *cert. denied*, 448 U.S. 907 (1980); *In re District of Columbia Workmen's Compensation Act*, 180 U.S. App. D.C. 216, 554 F.2d 1075 (1976), *cert. denied*, 429 U.S. 820 (1976). This extension was the first of several enactments by which various constituencies not otherwise covered by state compensation laws received the benefit of federal law. *See*, for example, the Non-Appropriated Fund Instrumentalities Act, Act of June 19, 1952, ch. 444, 66 Stat. 131 (5 U.S.C. §§ 8171 *et seq.*) and the Defense Base Act, Act of August 16, 1941, ch. 357, 55 Stat. 622 (42 U.S.C. §§ 1651 *et seq.*) As with the District Act, most of the extensions of the Longshoremen's Act have little or nothing to do with the so-called maritime concepts which led at the outset to the Longshoremen's Act. *Crowell* v. *Benson*, 285 U.S. 22 (1934); *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917). Congress simply chose to cover employees in various locations and job categories who could not receive benefits under state laws. As the Court below correctly noted,

> . . . the Longshoremen's Act provided a solution to [Congress'] inability to agree on a program to cover private employees in the District of Columbia . . . [27]

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[27] Appendix B at 5a.

The net result of Congress' action was to impose a federal law on the eligible District employees. The salient point is the undeniable federal quality of each and every aspect of the Congressionally enacted § 36-501 *et seq.* Despite the Court of Appeals' view that § 36-501 is nothing more than a local act handled by the federal government as a matter of convenience, the clear and convincing evidence indicates that nothing could be further from the truth.

The Longshoremen's Act provisions have been administered by the Secretary of Labor since its inception in 1927. Similarly, once that law was extended to the District a year later, District employees were treated identically to their waterfront counterparts. The Secretary established another compensation district, District 40, to handle claims as was done in areas such as Los Angeles, Houston, Chicago and New York, 33 U.S.C. § 939(h). At all times, the Act is administered by employees and officials of the United States Department of Labor, 33 U.S.C. § 939(a). None has any relationship to the District. These officials direct policy and procedure for all compensation districts, publishing this information in a series of a volumes known as the Longshoremen's and Harbor Workers' Procedure Manual (LHWCA-PM, United States Department of Labor, December, 1978).

No special provisions are present in these documents concerning the District of Columbia; the pronouncements apply to all covered employees regardless of whether the Longshoremen's Act or one of its many extensions is involved. Administrative adjudications are made by the Office of Administrative Law Judges and the Benefits Review Board, 33 U.S.C. § 921(b), both of which are branches of the United States Department of Labor. Ultimately, formal judicial action on all claims arising under the Longshoremen's Act and its extensions comes under the jurisdiction of the federal court system, 33 U.S.C. §§ 918(a), 921(c). At no time can local or state courts in the District or elsewhere adjudicate any Longshoremen's Act claim or any claim arising under the extension of the Act to the District. *See Harrington* v. *Moss*, 407 A.2d 658

(D.C. App. 1979). Thus, from the filing of an initial claim by an injured worker in the District to its final adjudication in the United States Court of Appeals for the District of Columbia, the entire process remains solely within the province of the federal establishment. Each activity performed by any Labor Department employee, a federal employee, can only be denominated a federal function.

The Court of Appeals relied heavily on the fact that, allegedly, "no federal funds are involved in the Department of Labor's administration of § 36-501 " [28] While § 36-503 does suggest that sums be appropriated to pay the expenses incurred by the Department of Labor, the truth is that the District's contribution has never formed a significant percentage of District 40's budget. In recent years, the District has contributed [29] an average of $800,000 annually to defray costs. This amount obviously has little impact on the total cost of over 40 employees, rent, supplies, computer expenses and the like, as well as the value of services performed by the Office of Administrative Law Judges, Benefits Review Board and the Solicitor of Labor's office. [30] Funds are appropriated by the Department of Labor from its various programs to pay for District 40. Without this federal money, there would be no program.

Indisputably, all of the foregoing characteristics are federal in nature. Yet not one was mentioned in the Court's opinion. Under these circumstances, it is difficult to comprehend how

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[28] Appendix B at 13a.

[29] Undoubtedly taken from the federal funds given to the District.

[30] In light of the number of cases heard by this Court in recent years which arose out of District claims, we assume the adjudicative cost is high. *See, U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, Office of Workers' Compensation Programs*, ___ U.S. ___ (Decided March 23, 1982); *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261 (1980); *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980).

the Court of Appeals could conclude that this program was simply a local function performed by federal officials. All of the clear facts demand a finding of federal function in this instance. As a consequence, the enactment of the Act of 1979 and the repeal of a Congressionally passed statute, § 36-501 *et seq.*, represent an obvious interference with and a usurpation of a federal function in contravention of § 1-233(a)(3). Without doubt, the District has exceeded its authority under the Self-Government Act and gone well beyond the intent of Congress.

In its attempt to remain within the confines of § 1-233(a)(3), the Court of Appeals found that § 36-501 was an act which applied exclusively to the District. Again, however, the Court overlooked contrary facts and case law in order to save the Workers' Compensation Act of 1979. The language of § 36-501 affords the broadest possible extraterritorial application:

> The provisions of the Longshoremen's and Harbor Workers' Compensation Act, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

The foregoing cannot be confined, as a practical matter, to the physical boundaries of the District. The simple geopolitical fact is that many employees who work in the District on a regular basis (1) are not District residents; (2) work a portion of the time for their District employers outside of the city; and (3) work in the District for employers whose places of business lie outside the District. The Courts, including this Court, have long recognized the extraterritorial application of § 36-501 due to the peculiar nature of this region and the relatively small size of the District itself. *See Thomas* v. *Washington Gas Light Co., supra; Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947); *Director, Office of Workers' Compensation*

Programs v. *National Van Lines, Inc.*, 198 U.S. App. D.C. 239, 613 F.2d 972 (1979); *Director, Office of Workers' Compensation Programs* v. *Boughman*, 178 U.S. App. D.C. 132, 545 F.2d 210 (1976); *Amalgamated Association of Street, etc. Employees* v. *Adler*, 119 U.S. App. D.C. 274, 340 F.2d 799 (1964).

In the *National Van Lines* case, which involved the District, Virginia, New York and Illinois, the United States Court of Appeals recognized that "[t]he most significant geographical division is the *metropolitan* Washington area." [31] This case affirms the long standing view that, for purposes of jurisdiction, the physical borders of the District have no meaning. It is a "metropolitan area" concept which applies with respect to both employees and employers who move in and out of the District's boundaries during the course of work activity. To restrict the application of § 36-501 to the confines of the District would be to equate it with such self-limiting laws as sales tax legislation.

In a related view, the extraterritorial aspect exists on a conceptual level as well. When the federal courts interpret the Longshoremen's Act, their rulings apply with equal force nationwide. The same is true even if the case arose in the District under § 36-501. No better example exists than this Court's decision in *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 260 (1980). There, this Court ruled, in a case arising under the extension of the Longshoremen's Act to the District, that the benefits payable under the scheduled injury list, 33 U.S.C. §§ 908(c)(1-20), were exclusive. What is unique is that this case has effect in the District and in any other jurisdiction in which Longshoremen's Act claims may arise. No state compensation act, be it Maryland, Virginia or California, can have this extrajurisdictional impact. [32] State laws and judicial interpretations

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[31] 613 F.2d at 975 (Emphasis supplied).

[32] The same is true of cases heard in the lesser federal courts. *See* for example, *Hastings* v. *Earth Satellite Corporation*, 202 U.S. App.

thereof are obviously limited in applicability while federally imposed laws, such as the Longshoremen's Act extension to the District, are not so circumscribed. Thus, a court decision regarding an arm injury in Maryland has no precedential effect upon a similar case in Utah. By contrast, any decision arising under the substantive provisions of the District's extension will be binding on similar cases in California, New York or wherever the Longshoremen's Act or any of its extensions are imposed. No clearer statement of the principle of national in scope exists, contrary to the local view of the panel below.

In a further attempt to bolster its finding that the Act of 1979 was exclusively local in nature, the Court of Appeals relied heavily on the obscure case of *Gudmundson* v. *Cardillo*, 75 U.S. App. D.C. 230, 126 F.2d 521 (1942). In that instance, the United States Court of Appeals for the District referred to the District's extension as a "wholly separate and distinct law" [33] based upon the dichotomy between Congress' Article I and Article III powers. Petitioner asserts that the panel below interpreted the case in isolation and without reference to the general state of the law in 1942. A more careful examination would have exposed the true reason for *Gudmundson's* existence.

The ultimate conclusion of the *Gudmundson* Court was that the separate nature of the two acts eliminated the requirement of a trial *de novo* in the District Court (as directed by *Crowell* v. *Benson*, *supra*) in the District of Columbia while still mandating it under the traditional Longshoremen's Act. Essentially, the federal Court of Appeals was intent on eliminating the trial *de novo* on jurisdictional issues as outmoded and unnecessary

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D.C. 85, 628 F.2d 85 (1980), *cert. denied*, 449 U.S. 905 (1980); *Director, Office of Workers' Compensation Programs* v. *National Van Lines*, *supra*; *Haughton Elevator Co.* v. *Lewis*, 572 F.2d 447 (4th Cir. 1978); and *Dillingham* v. *Massey*, 505 F.2d 1126 (9th Cir. 1974).

[33] 75 U.S. App. D.C. at 234, 126 F.2d at 525.

and utilized the artifice of the local versus federal dichotomy as a basis. Evidence of this fact is found in the Court's obvious disregard of *Metropolitan Casualty Insurance Co.* v. *Hoage*, 72 F.2d 175 (D.C. Cir. 1934), in which a trial *de novo* was held, pursuant to *Crowell* v. *Benson*, on the jurisdictional issue of the employer-employee relationship. By 1942, however, the *Crowell* doctrine was on the wane, with courts preferring to ignore the trial *de novo* while permitting the deputy commissioner [34] to become the fact finder in all instances. While *Crowell* v. *Benson* has never been specifically overruled, it is a case which was largely ignored within a decade or so of its issuance, [35] although occasional attempts were made in the years immediately preceding the 1972 amendments to resurrect it. [36]

As a consequence, although the *Gudmundson* case may appear to provide some support for the ruling of the panel below, it bears no true relationship to the issue at hand. Indeed, if one were to accept the literal language of *Gudmundson*, then the same would be required of later cases such as *Travelers Insurance Co.* v. *Cardillo*, 78 U.S. App. D.C. 392, 141 F.2d 362 (1944) and *In Re: District of Columbia Workmen's Compensation Act* which refer specifically to the Longshoremen's Act as being adopted for the District without any reference whatsoever to Article I obligations. [37] In the latter case, for example, the Court of Appeals noted that the injured

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[34] Administrative law judges become the prime fact finders subsequent to the 1972 amendments to § 919(d) of the Longshoremen's Act, 33 U.S.C. § 919(d). All formal administrative hearings are now conducted by such judges.

[35] *See* for example, *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 640 (1947).

[36] *Associated Indemnity* v. *Shea*, 455 F.2d 913 (5th Cir. 1972) and *Rockport Yacht Supply Co., Inc.* v. *Hollis*, 371 F. Supp 1229, 1231 (S.D. Tex. 1973).

[37] *See* 141 F.2d at 364 and 551 F.2d 1077, 1078-1081.

worker had filed his claim under the Longshoremen's Act; it proceeded to review the case at length as one arising under the Act even though the injury did not occur upon the navigable waters of the United States, as the *Gudmundson* court would have required.

In summary, then, *Gudmundson* must be viewed as having little to offer in this instance in light of its historical setting and subsequent case law.

Finally, it is Petitioner's position that the action taken by the Council not only interfered with "federal functions" within the meaning of § 1-233(a)(3), but also affronts the Supremacy Clause of the Constitution, U.S. CONST. Art. VI, cl. 2. While attempts are frequently made to reconcile state and federal statutory schemes to avoid this confrontation, federal courts have been far less reluctant to strike down local legislation when it impacts directly on federal operations. [38] As stated by the United States Court of Appeals in a recent case involving the District and the Self-Government Act:

> . . . Inasmuch as such laws substantially impede federal activities or directly place "a prohibition on the federal government" [citation omitted] the [Supreme] Court has treated them as presumptively invalid under the Supremacy Clause: "where congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free of regulation." [39]

That decision uses phrases such as "a clear congressional mandate" and "specific congressional action" [40] to denote the basic

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[38] *Sperry* v. *Florida*, 373 U.S. 379, 383-5 (1963); *California Pub. Util. Comm'n.* v. *United States*, 355 U.S. 534, 544 (1956); *Johnson* v. *Maryland*, 254 U.S. 51, 55 (1920); *In re Neagle*, 135 U.S. 1 (1890).

[39] *Don't Tear It Down* v. *Pennsylvania Ave. Dev. Corp.*, 206 U.S. App. D.C. 122, 642 F.2d 527, 534 (1980), citing *Hancock* v. *Train*, 426 U.S. 167, 169 (1976) and *Mayo* v. *United States*, 319 U.S. 441, 447-8 (1943).

[40] 642 F.2d at 536.

requirement for upholding local legislation in the face of the Supremacy Clause. Reference to Arguments I and II, *supra*, demonstrates the lack of such express congressional authority in the instant case. Thus, where local legislation such as the Act of 1979 not only interfere with federal functions but repeals a congressionally enacted statute, it must fall.

Petitioner therefore respectfully asserts that the enactment of the Workers' Compensation Act of 1979 violated not only the prohibitory provisions of the Self-Government Act in § 1-233(a)(3), but also ran afoul of the Supremacy Clause of the Constitution. For reasons best known to the panel below, this issue was erroneously decided and now presents itself as appropriate for review by this Honorable Court.

IV

The District Of Columbia Court Of Appeals Erred In Ruling That The Workers' Compensation Act Of 1979 Did Not Violate The Prohibitions Contained in §§ 1-233(4) And (8) Of The Self-Government Act

Among the other express prohibitions contained in § 1-233 of the Self-Government Act are those regarding the two court systems in the District. Two specific subsections remove authority from the District to:

> (4) [e]nact any act, resolution, or rule, with respect to any provision of Title 11 [of the District of Columbia Code] (relating to organization and jurisdiction of the District of Columbia Courts);
>
> (8) [e]nact any act or regulation relating to the United States District Court for the District of Columbia or any other court of the United States in the District other than the District Courts . . .

In its ruling in favor of the District, the Court of Appeals reviewed these subsections, along with the District of Columbia Court Reform and Criminal Procedure Act, D.C. Code 1981, §§ 11-101 *et seq.* The Court concluded that the net effect of the Act of 1979 and the Court Reform Act was to permit the assumption by Superior Court and the Court of Appeals of the

cases and duties arising under § 36-322(b)(3) and § 36-322(c) of the Act of 1979. Formerly, that authority reposed in the United States District Court (enforcement) under 33 U.S.C. § 918(a) and the United States Court of Appeals for the District (appellate jurisdiction), pursuant to 33 U.S.C. § 921(c) and (d). The panel below decided that the allegedly local nature of the Council's action justified the exchange of jurisdiction. Petitioner contends that this approach fails to address the point raised at oral argument and in all briefs.

As noted above, § 921(c) of the Longshoremen's Act extension 33 U.S.C. § 921(c), confers exclusive jurisdiction for appeals taken from the Benefits Review Board in the United States Court of Appeals for the District of Columbia. This is a matter of exclusive jurisdiction not subject to alteration by any legislative body other than Congress. If any question existed as to which court can claim jurisdiction over appeals, the case of *Director, Office of Workers' Compensation Programs* v. *National Van Lines, supra*, eliminates it. In that case, the Court stated:

> . . . Consistent with the above authorities we hold that, for purposes of appellate jurisdiction, injuries giving rise to claims under 36 D.C. Code, § 501 'occur' within the territorial jurisdiction of the United States Court of Appeals for the District of Columbia Circuit . . . [41]

Similarly, in *In re Matter of District of Columbia Workers' Compensation Act, supra*, the Court of Appeals indulged in a lengthy review and analysis of the effects of the 1972 amendments to the Longshoremen's Act on whether the federal court should hear appeals after the effective date of those amendments. [42]

Viewing these cases, as the Court below failed to do, it can be seen that repeal of § 36-501 resulted in another impermissible

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[41] 613 F.2d at 979 n. 20.

[42] 554 F.2d at 1078-81.

infringement on a federal function as well as being in contravention of the specific prohibitions contained in §§ 1-233(a)(4) and (8) of the Self-Government Act. Without express Congressional authority, the District has removed an entire class of cases from the federal court system and placed them under the auspices of the District's local courts. It is not sufficient to state that these are "contested cases" which the local courts can review. Such statements are but half truths, ignoring the distinctly federal quality of cases which arose under the Longshoremen's Act extension to the District of Columbia. The resort to the concept of localism as a justification for the repeal of § 36-501 is insufficient to support the Council's action.

It is interesting to note that the opinion of the Court below in response to the parties' *en banc* petition sets forth a certain amount of concern over the three judge panel's brief dismissal of the issue of the violation of §§ 1-233(a)(4) and (8). Associate Judge Belson, writing on behalf of himself and three other judges, expressed his concern as follows:

> It may well be that most or all of the members of the court *en banc* would adopt the rationale and result of the division's carefully reasoned opinion confirming the power of the District of Columbia Council to adopt the disputed legislation. However, if this court is to render a decision which confirms the authority of the Council to transfer cases from the federal system to the District of Columbia system, I feel that it should be rendered by the court *en banc* rather than by a division. [43]

This statement is something less than an endorsement of the Council's action and echoes the statements set forth in Argument II prior to passage of the Act of 1979. Clearly, a significant portion of the Court had doubts, leaving the impression that transfer of jurisdiction from the federal to the local courts was ill-founded.

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[43] Appendix A at 2a. The Court denied the *en banc* petition based upon an evenly divided vote of the judges in active service.

Petitioner respectfully suggests that a thorough examination of the Longshoremen's Act case law discussed *supra* also will lead to the conclusion that interference with the federal courts occurred. The entire discussion concerning the extra-territorial effect of the law is equally relevant to this Argument. Clearly, only decisions emanating from the federal court system can have nationwide impact, including those issued by the United States Court of Appeals for the District of Columbia under § 36-501. Consequently, it is an ineluctable conclusion that any law which alters the jurisdiction of these courts contravenes, by definition, the several specific prohibitions contained in the Self-Government Act.

In sum, regardless of the approach taken, it is evident that the Workers' Compensation Act of 1979, as passed by the Council of the District of Columbia, redefined the authority of both the federal and local courts. Such action was impermissible under the terms of §§ 1-233(a)(4) and (8). The imprimatur granted by the Court of Appeals was in error and is deserving of review by this Honorable Court.

CONCLUSION

For each and all of the reasons set forth above, Petitioner respectfully urges this Honorable Court to grant the petition for a writ of certiorari.

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